Supreme Court, U.S.
FILED
MAR 6 - 2015
OFFICE OF THE CLERK

No. 14-556, 14-562, 14-571 & 14-574

IN THE

Supreme Court of the United States

JAMES OBERGEFELL, ET AL., *Petitioners,*
v.
RICHARD HODGES, ET AL., *Respondents.*

VALERIA TANCO, ET AL., *Petitioners,*
v.
WILLIAM EDWARD "BILL" HASLAM, ET AL., *Respondents.*

APRIL DEBOER, ET AL., *Petitioners,*
v.
RICHARD SNYDER, ET AL., *Respondents.*

GREGORY BOURKE, ET AL., *Petitioners,*
v.
STEVE BESHEAR, ET AL., *Respondents.*

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR *AMICUS CURIAE* THE LIBERTY EDUCATION FORUM IN SUPPORT OF PETITIONERS

CRAIG ENGLE
(Counsel of Record)
THORNE MAGINNIS*
ARENT FOX LLP
1717 K Street, N.W.
Washington, D.C. 20036
(202) 857-6000
craig.engle@arentfox.com

BRETT G. KAPPEL
AKERMAN LLP
750 Ninth Street, N.W.
Suite 750
Washington, D.C. 20001
(202) 393-6222

**Admitted in Virginia only; supervised by principals of the firm*

Counsel for *Amicus Curiae*

TABLE OF CONTENTS

Page

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. THE FOURTEENTH AMENDMENT DOES NOT PERMIT A STATE TO PROHIBIT SAME-SEX MARRIAGES WHEN IT VIOLATES THE FIRST AMENDMENT RIGHTS OF COUPLES MAKING POLITICAL CONTRIBUTIONS 3

A. Respondents Give Single-Income Married Couples Two Contribution Limits But Same-Sex Couples Only One 5

B. State Laws Can Give Married Couples More Rights To Support A Spouse's Candidacy 8

C. Respondents More Readily Subject Same-Sex Couples To Campaign Finance Limits And Prohibitions 10

D. Federal Campaign Finance Laws Are Consistent With Both Arguments Of Amicus 11

TABLE OF CONTENTS
(Continued)

Page

II. THE FOURTEENTH AMENDMENT DOES NOT ALLOW A STATE TO VIOLATE THE FIRST AMENDMENT RIGHTS OF LAWFULLY-WEDDED DONORS IN OTHER STATES 16

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

CASES

Buckley v. Am. Constitutional Law Foundation, Inc., 525 U.S. 182 (1999) 18

Buckley v. Valeo, 424 U.S. 1 (1976) 3, 4, 9

Citizens United v. FEC, 558 U.S. 310 (2010) 3, 4

City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) 7

Davis v. FEC, 554 U.S. 724 (2008) 4, 7, 9

DeBoer v. Snyder, 772 F.3d 388 (2014) 3, 7, 9

Gitlow v. New York, 268 U.S. 652 (1925) 4

Henry v. Himes, 14 F Supp. 3d 1036 (S.D. Ohio 2014) 3

Landell v. Sorrell, 382 F.3d 91 (2d Cir. 2004) 19, 20

Lawrence v. Texas, 539 U.S. 558 (2003) 11

Lerman v. Bd. of Elections, 232 F.3d 135 (2d Cir. 2000) 19

Libertarian Party of Va. v. Judd, 881 F. Supp. 2d 719 (E.D. Va. 2012) 18

TABLE OF AUTHORITIES
(Continued)

Page(s)

McConnell v. FEC,
540 U.S. 93 (2003) 3, 4

Nader v. Blackwell,
545 F.3d 459 (6th Cir. 2008) 18

Nader v. Brewer,
531 F.3d 1028 (9th Cir. 2008) 18

Randall v. Sorrell,
548 U.S. 230 (2006) 19

Romer v. Evans,
517 U.S. 620 (1996) 4

United States v. Windsor,
133 S. Ct. 2675 (2013) ..... passim

VanNatta v. Keisling,
151 F.3d 1215 (9th Cir. 1998) 20

STATUTES

1 U.S.C. § 7 12

52 U.S.C. § 30101 ..... 13, 14, 15

52 U.S.C. § 30108 13

52 U.S.C. § 30116 ..... 13, 14

52 U.S.C. § 30122 ..... 11, 13

Ky. Rev. Stat. Ann. § 121.150 ..... 5, 7

Ky. Rev. Stat. Ann. § 121.990 10

Mich. Comp. Laws Ann. § 169.241 ..... 5, 10

Ohio Rev. Code Ann. § 3517.13 ..... 5, 6, 13

Ohio Rev. Code Ann. § 3517.992 10

TABLE OF AUTHORITIES
(Continued)

Page(s)

Tenn. Code Ann. § 2-10-308 10

REGULATIONS

11 C.F.R. § 100.33 ..... 12, 13, 15

11 C.F.R. § 100.52 ..... 12, 14

11 C.F.R. § 100.82 14

11 C.F.R. § 100.83 14

11 C.F.R. § 100.142 14

11 C.F.R. § 110.1 ..... 11, 12

11 C.F.R. § 110.10 13

11 C.F.R. § 110.11 14

48 Fed. Reg. 19,019 (Apr. 27, 1983) 14

OTHER AUTHORITIES

Brief *Amici Curiae* of Former Federal Election Officials in *United States v. Windsor*, 2013 WL 871957 (Mar. 1, 2013) 15

Candidate Guide to Campaign Finance, Kentucky Registry of Election Finance (2011) 6

Citizen's Guide, Tennessee Registry of Election Finance 5, 6

FEC, 2012 Candidate Summary 15

FEC Advisory Op. 1980-11 (Feb. 11, 1980) 12

FEC Advisory Op. 1991-10 (Apr. 12, 1991) 14

FEC Advisory Op. 2013-02 (Apr. 25, 2013) 12

TABLE OF AUTHORITIES
(Continued)

Page(s)

FEC Advisory Op. 2013-06 (July 25, 2013) 12

FEC Advisory Op. 2013-07 (July 25, 2013) 12

Taking the Stand: Oops! A View from the Bench, Washington Lawyer (Feb. 2014) 16

Walter Webber & Hans von Spakovsy, *How a Former Justice Wants to Restrict Political Participation* RealClearPolitics.com (Feb. 14, 2015). 16, 17

INTEREST OF THE *AMICUS CURIAE*[1]

Amicus is a longstanding 501(c)(3) membership organization dedicated to educating the public about the importance of achieving freedom and fairness for all Americans regardless of sexual orientation. Amicus has participated in litigation, sponsored numerous forums, and published literature all dedicated to improving the laws and attitudes in the United States toward gays and lesbians.

Amicus is a non-partisan organization, but it also works with the Log Cabin Republicans which is a political organization that has members across the United States. Together, these two groups repeatedly stress the importance of making political contributions to gain an equal place in America.

SUMMARY OF ARGUMENT

This Court has repeatedly affirmed that a person has a First Amendment right to make a political contribution. Preventing corruption or its appearance is the only justifiable reason a state can limit that right. Respondents' anti-marriage laws are unconstitutionally interfering with that right.

All four states before you extend to a husband and wife their own contribution limits, even if only one spouse brings income into the marriage. This is informally referred to as the "spousal exemption" to those states' contribution limits and prohibitions

---

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation of submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

against making contributions "in the name of another." Those prohibitions make it unlawful for one person to use another person's name or money to make a political contribution. Some states take the spousal exemption even further by allowing spouses wide latitude to use each others' money to run for office.

Partners in an equally-committed single-income same-sex relationship do not have the benefit of a spousal exemption: not because there is a fear of corruption, but because the state will not let them marry. This inequality is easy to quantify. Respondents' anti-marriage laws have created mathematically unconstitutional and unequal campaign finance laws for nearly identical couples.

Amicus is not asking the Court to "level the playing field" or rule contrary to federal campaign finance law. Actually, amicus' arguments are quite consistent with federal law. Amicus is also not seeking to change Respondents' campaign finance laws or definitions of property. Amicus only seeks to demonstrate that the application of those laws reveals how Respondents' anti-marriage prohibitions violate the Fourteenth Amendment by cutting the First Amendment right of some donors in half.

Amicus supports this Court's opinions that expect officeholders to zealously work in favor of their donors. And Amicus respects that part of the decision below that favors results gained by the democratic process. But this Court should not sustain a majority's laws, like the ones at issue today, which limit the ability of the minority's candidates and supporters to oppose and change those laws.

ARGUMENT

I. THE FOURTEENTH AMENDMENT DOES NOT PERMIT A STATE TO PROHIBIT SAME-SEX MARRIAGES WHEN IT VIOLATES THE FIRST AMENDMENT RIGHTS OF COUPLES MAKING POLITICAL CONTRIBUTIONS.

Today's cases are not campaign finance cases.[2] Yet campaign finance jurisprudence reveals a well-recognized unconstitutional discrimination occurs where same sex marriages are prohibited.

From *Buckley v. Valeo* forward, this Court has recognized the principle that making political contributions involves core First Amendment rights. *See Buckley v. Valeo*, 424 U.S. 1, 13 (1976) ("[C]ontribution and expenditure limitations operate in an area of the most fundamental First Amendment activities."); *see also McConnell v. FEC*, 540 U.S. 93 (2003); *Citizens United v. FEC*, 558 U.S. 310 (2010). While there have been differing opinions about how much money can be contributed and by whom, this Court has long held that the First Amendment gives every American an equal right to

---

[2] Although Petitioners did not make the arguments presented in this brief, they are, in Amicus' opinion, under the umbrella of the decision in *Henry* which "encompass[es] all married same-sex couples and all legal incidents of marriage under Ohio law." *DeBoer v. Snyder*, 772 F.3d 388, 398 (2014) (discussing *Henry v. Himes*, 14 F. Supp. 3d 1036 (S.D. Ohio 2014)). As pointed out in *United States v. Windsor*, these anti-marriage laws have a surprisingly greater reach than may be initially expected. 133 S. Ct. 2675, 2694-95 (2013).

make the political contributions of their choice. *Id.*[3]

To protect this right, this Court has made clear that it will not tolerate artifices that restrict or enhance one person's voice over another. *See, e.g.*, *Davis v. FEC*, 554 U.S. 724 (2008) (finding unconstitutional a scheme in which some donors have treble the contribution limit of other donors in the same race); *McConnell v. FEC*, 540 U.S. 93 (2003) (finding unconstitutional a prohibition against minors making political contributions). While these decisions invalidated campaign finance laws, this Court has stated that any law restricting a group's ability to engage in the political process is constitutionally suspect. *See Romer v. Evans*, 517 U.S. 620, 633, (1996) ("A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.").[4]

Respondents' same-sex marriage prohibitions, when viewed together with their campaign finance laws, result in similarly situated couples having unequal rights to engage in the political process through political contributions. A state's differential treatment with regard to core First Amendment rights violates the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

---

[3] Amicus knows this Court is well-aware of the long string of citations that can occur in campaign finance cases and will limit our use of authority.

[4] To reach this conclusion, the *Romer* Court relied on this Court's voting rights cases and precedents involving discriminatory restructuring of governmental decision-making. *Romer*, 517 U.S. at 633-34.

As shown in three examples below, prohibiting same-sex marriage results in similarly-situated couples having different contribution limits and prohibitions. Respondents can only justify those differences by showing that prohibiting same-sex marriage prevents corruption or its appearance. They cannot.

A. Respondents Give Single-Income Married Couples Two Contribution Limits But Same-Sex Couples Only One.

The first example of how Respondents have created unconstitutional campaign finance practices through their same-sex-marriage prohibitions involves the ability of one married spouse to fund the other's political contributions.

It is well settled that each person has their own contribution limit. These limits do not have to be shared or allocated or aggregated among donors, especially within families. To each his own. But it is also understood that a person must use his or her own money to make their own political contributions. Respondents properly prevent donors from circumventing individual contribution limits by prohibiting what is commonly referred to as a "contribution in the name of another." *See* Ky. Rev. Stat. Ann. § 121.150(12); Mich. Comp. Laws Ann. § 169.241(3); Ohio Rev. Code Ann. § 3517.13(G)(2)(a); *Citizen's Guide*, Tennessee Registry of Election Finance, http://www.tn.gov/tref/CitizensGuide.htm#2 (last visited Mar. 4, 2015).

But Respondents, either by statute or agency policy, waive this prohibition for two people in a single-income couple, *but only if they are lawfully*

married. See Ohio Rev. Code Ann. § 3517.13(G)(2)(b)(ii); *Candidate Guide to Campaign Finance*, Kentucky Registry of Election Finance 62 (2011), *available at* http://kref.ky.gov/Slates/2011GuideBook.pdf; *Citizen's Guide*, Tennessee Registry of Election finance, http://www.tn.gov/tref/CitizensGuide.htm#2 (last visited Mar. 4, 2015). These waivers are often and revealingly referred to as the "spousal exemption" from campaign finance laws.[5]

> This inequity becomes clear with a hypothetical:
>
> Mr. and Mrs. Brown are a traditional, conservative single-income married couple: he is the breadwinner and she is a stay-at-home mother and wife. They discuss the positions of the candidates and decide they will each make the maximum $5,000 contribution from the husband's income to their incumbent governor. Two people, one household, one income, yet two contributions totaling $10,000 for the governor.
>
> Mr. Black and Mr. White are an equally-committed single-income couple. Mr. Black works and Mr. White takes care of their adopted children. Their only difference from the Browns is they are not spouses because the state prohibits them from marrying. This couple discusses the candidates and decides to give the maximum contribution they can to the

---

[5] The "spousal exemption" here and the "marital exemption" in *Windsor* have helpful similarities in name and effect. *Windsor*, 133 S. Ct. at 2683.

> governor's opponent. Two people, one household, one income, but only one $5,000 contribution is allowed to the governor's opponent.

The hypothetical ends with the governor winning re-election because he opposed same-sex marriage and out-raised his opponent. To be sure, different candidates will always raise different totals based on their popularity and differing views, and this Court has never set out to equalize the differences among candidates. *See Davis*, 554 U.S. at 742 ("Different candidates have different strengths."). But this Court has also said that it "has never upheld the constitutionality of a law that imposes different contribution limits for candidates who are competing against each other." *Id.* at 738.

To allow that would permit a majority to become self-perpetuating and pass a law that denies a minority a right, and under the surface also denies that same minority an equal right *to seek that right*. This Court has explained that while "the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes," it will conduct a searching review where the "discrimination is unlikely to be soon rectified by legislative means." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).[6]

---

[6] See footnote 6 in the dissenting opinion below regarding the impracticalities involved in amending, re-amending or un-amending a state constitution. *DeBoer*, 772 F.3d at 435 n.6 (Daughtrey, J., dissenting). This difficulty is reinforced against same-sex couples where there are campaign-finance limits on contributions to ballot issues committees, as is the case in Kentucky. Ky. Rev. Stat. Ann. § 121.150.

The interaction between Respondents' same-sex marriage prohibitions and campaign finance laws creates a circular scenario in which same-sex couples face discrimination with regard to their right to marry, but are prevented from equal participation in the political process through which they might end that discrimination. Regardless of whether a minority is trying to overturn popular opinion or popular officeholders, the First Amendment mandates equal contribution rights. Respondents' special exemption for spouses enhances their rights at the expense of same-sex couples. The law causing this inequality – the prohibition against same-sex marriages – must be struck.

B. State Laws Can Give Married Couples More Rights To Support A Spouse's Candidacy.

The second inequality occurs in this hypothetical: one person in both of our two couples decides to run for governor.

> Each of our couples has $1,000,000 in disposable assets from the earnings of the breadwinning spouse or partner. The Browns can hold this money as marital property entitling each to have access to the whole. Mrs. Brown, who opposes same-sex marriage, uses all $1,000,000 of her husband's earnings for her campaign. Mr. White, the non-earning partner in the same-sex relationship may only use $500,000 of their savings as joint property, or worse, only a part of it to ensure his partner as a co-signor does not violate the state's $5,000 contribution limit, or—worse yet—*none* of it, if it is alleged his partner gave him the

> money to contribute to his own campaign. Two candidates, each in a relationship with $1,000,000 of disposable assets, but not equally able to spend it on their own campaigns: not by choice but by the state's marital prohibition.

It is well settled that a person may use an unlimited amount of their personal funds to run for office.[7] In fact, this Court has lauded such a practice. *Davis*, 554 U.S. at 738 ("'[T]he use of personal funds,' we observed, 'reduces the candidate's dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks [of outside donations].'"(quoting *Buckley*, 424 U.S. at 52-53)). Yet spouses in heterosexual married couples have a statutorily-approved greater ability to contribute their personal funds to their campaigns than do same-sex couples.[8]

There is no anti-corruption rationale that can save this difference. Instead, a state creates an

---

[7] As this Court has said, a candidate has "a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election" and restrictions on a candidate's use of personal funds to do so imposes a substantial clear and direct restraint on that right without serving a compelling government interest. *Buckley v. Valeo*, 424 U.S. at 52-53.

[8] As this Court knows, state property laws can be complex and varied regarding marital or joint property held in life, with a spouse or another person, or passing in death (as shown in *Windsor*). Amicus does not seek to upset state property laws. But, just as the federal government traditionally supports states' definitions of property and marriage, instead of fashioning its own, a state's own application of its property laws can create a federal question. *See generally DeBoer*, 772 F.3d 388 (citing *Windsor*, 133 S. Ct. at 2691).

unconstitutional setting for elections by mathematically enhancing the First Amendment rights of some self-financing candidates over others.

C. Respondents More Readily Subject Same-Sex Couples To Campaign Finance Limits And Prohibitions.

The third example of how Respondents' anti-marriage laws create unconstitutional campaign finance practices is through the direct enforcement of contribution limits and prohibitions against "contributions in the name of another." Respondents each provide for criminal penalties for violations of the prohibitions. *See* Ky. Rev. Stat. Ann. § 121.990(3); Mich. Comp. Laws Ann. § 169.241(4); Ohio Rev. Code Ann. § 3517.992(C); Tenn. Code Ann. § 2-10-308.[9] These laws are reasonable, prevent circumvention of contribution limits and corruption, and help keep the public record of campaign contributions accurate. They are, unfortunately, also unequally applied in states that prohibit same-sex marriage.

In the examples above, if Mr. White uses Mr. Black's money or income to make a political contribution or finance his own campaign, then Mr. Black has made an excessive contribution and a contribution in the name of another, and Mr. White has facilitated the making of a contribution in the name of another. Two people, three violations. But,

---

[9] Two of the states, Michigan and Kentucky, authorize jail time for violations of their prohibitions on contributions in the name of another. *See* Ky. Rev. Stat. Ann. § 121.990(3); Mich. Comp. Laws. Ann. § 169.241(4). In fact, in Kentucky, violating the prohibition is a felony with punishment of up to five years in prison. *See* Ky. Rev. Stat. Ann. § 121.990(3).

as noted, Respondents have granted married couples spousal immunity from the civil and criminal liability attached to contribution limits and contributions in the name of another. Two people, zero violations.

Accordingly, Respondents' same-sex marriage prohibitions, when applied with their campaign finance laws, subject same-sex couples to criminal penalties—including imprisonment—for conduct in which married couples are free to engage.

The Fourteenth Amendment does not permit states to dole out criminal punishment selectively among classes of persons for identical conduct—especially not core First Amendment speech. *See Lawrence v. Texas*, 539 U.S. 558, 585 (2003) (O'Connor, J., concurring) ("A law branding one class of persons as criminal based solely on the State's moral disapproval of that class and the conduct associated with that class runs contrary to the values of the Constitution.").

D. Federal Campaign Finance Laws Are Consistent With Both Arguments Of Amicus.

Federal law, like the Respondent States, makes it illegal, subject to both civil and criminal penalties, for an individual to make a political contribution in the name of another person, 52 U.S.C. § 30122, and similarly allows both spouses to make contributions to federal candidates even if only one spouse has income, 11 C.F.R. § 110.1(i). The Federal Election Commission has long interpreted Section 110.1(i) to be a spousal exemption from the prohibition on contributions in the name of another by allowing each spouse in a single-income marriage to make the

maximum contribution to a federal candidate. FEC Advisory Op. 1980-11 (Feb. 11, 1980).

Prior to *United States v. Windsor*, the FEC declined to extend the marital exemption to same-sex couples in states that recognize same-sex marriages. In FEC Advisory Opinion 2013-02 (Apr. 25, 2013) ("*Winslow I*"), the FEC held that Section 3 of the Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7, prohibited the Commission from allowing a married same-sex Massachusetts couple to rely on the spousal exemption to make a joint contribution to a candidate for U.S. Senator for Massachusetts. After this Court held Section 3 of DOMA to be unconstitutional in *Windsor*, 133 S Ct. 2675, the FEC reversed itself and held that same-sex couples married under state law are "spouses" for purposes of Commission regulations and, accordingly, could rely on 11 C.F.R. § 110.1(i) to make a joint contribution to a federal candidate in their state. FEC Advisory Op. 2013-07 (July 25, 2013) ("*Winslow II*").[10]

While *Winslow II* protects the right of same-sex couples to make contributions to federal candidates in their own state, the ability of same-sex couples to make contributions to federal candidates in other states remains in doubt. FEC advisory opinions are

---

[10] The FEC also held that a national party committee could rely on 11 C.F.R. § 110.1(i) to accept contributions from same-sex couples married under state law. FEC Advisory Op. 2013-06 (July 25, 2013). Significantly, the FEC also held that a Senate candidate legally married to a same-sex spouse could utilize jointly owned assets for his campaign in accordance with the FEC regulations that allow opposite-sex Senate candidates to have access to jointly owned assets. *Id.* (citing 11 C.F.R. §§ 100.33(c), 100.52(b)(4)).

limited to their facts and apply only in matters "indistinguishable in all its material aspects" from the transaction approved in the advisory opinion. 52 U.S.C. § 30108(c)(1)(B). Accordingly, a married Massachusetts same-sex couple may not necessarily rely on *Winslow II* to make a joint contribution to a candidate for the U.S. Senate in Ohio.

Assuming, *arguendo*, that the FEC were to extend *Winslow II* to apply to contributions to federal candidates in other states, the First Amendment rights of same-sex couples would still be compromised here. A Massachusetts same-sex couple could not be charged with violating 52 U.S.C. § 30122 for making a joint contribution to a candidate for *U.S. Senate* in Ohio, but they could be fined up to $10,000 for violating Ohio Rev. Code § 3517.13(G)(2)(a) if they made a joint contribution to a *gubernatorial* candidate in Ohio. Only this Court, by finding that the Fourteenth Amendment requires states to recognize same-sex marriages performed in states where such marriages are legal, can prevent such an incongruous infringement on First Amendment rights of political speech.

Second, and consistent with Respondents, federal campaign finance law permits a federal candidate to tap an unlimited amount of "personal funds" to further his candidacy. 52 U.S.C. § 30116(a)-(b); 11 C.F.R. § 110.10.

Amounts derived from an asset held exclusively by a candidate are "personal funds," available for unlimited use in the candidate's campaign. 52 U.S.C. § 30101(26)(A); 11 C.F.R. § 100.33(a). The FEC has also determined that amounts derived from an asset are, as a general matter, "personal funds" only if the

candidate has a unilateral right of access to and control over the asset. FEC Advisory Op. 1991-10 at 3 (Apr. 12, 1991) (concluding that when "withdrawals from [a joint] account require the signatures of both" account holders, "the candidate does not have legal right of access to or control over" the account, as that phrase is used in the "personal funds" definition).

Further, when a federal candidate utilizes a jointly held asset he raises the prospect of receiving a campaign contribution from the asset's joint owner, which is subject to the contribution limits under federal campaign finance law. 52 U.S.C. § 30116(a); 11 C.F.R. § 110.11. If a federal candidate encumbers a jointly held asset to make a contribution to his campaign, he is also deemed to have received a contribution from any endorser, guarantor, or co-signer of the loan. 52 U.S.C. § 30101(8)(B)(vii)(I); 11 C.F.R. §§ 100.52(b)(3), 100.82(c), 100.83(b), 100.142(c).

But, and as shown on the state level, the "spousal exemption" lifts the limits on how much of a joint asset can be considered a candidate's personal funds. For example, a "spouse" may endorse, guarantee, or co-sign a campaign loan without making a campaign contribution. 11 C.F.R. §§ 100.52(b)(4), 100.82(c), 100.83(b), 100.142(c). Similarly, "to address the concept of 'personal funds' in joint ownership situations," FECA and the FEC "carve[d] out a narrow area to allow for the use of property in which the candidate's spouse has an interest." 48 Fed. Reg. 19,019, 19,019-19,020 (Apr. 27, 1983). Pursuant to this exemption, our Mrs. Brown has broad access to her spouse's, and their marital, assets to finance her

federal campaign. 52 U.S.C. § 30101(26)(C); 11 C.F.R. § 100.33(c). Mr. Black and White are not as fortunate: they have no marital assets or spousal exemption, and they risk violating the contribution limits even by having Mr. White co-signing a loan to Mr. Black's campaign.

Accordingly, the removal of DOMA on the federal level was necessary to remove the unconstitutional discrimination between married couples and same-sex partners. DOMA's requirement that "spouse" means "only a person of the opposite sex who is a husband or a wife" coupled with the "spousal exemptions" under FEC law to financially handicap self-funding federal candidates in same-sex marriages.[11]

As such, Amicus' arguments about Respondents' laws are consistent with the issues raised and answers reached in federal election law. This Court can be reliable and consistent in knowing these inequalities are real, appear in both state and federal elections, and can be solved by striking same-sex marriage prohibitions for these reasons.

---

[11] This is not a mere technicality or theoretical issue. Many federal candidates rely on personal funds to support their own campaigns. *See* Brief *Amici Curiae* of Former Federal Election Officials in *United States v. Windsor*, 2013 WL 871957, at *3-6 (Mar. 1, 2013). FEC records show, for example, that over 40 percent of the 3,061 candidates for U.S. Senate and U.S. House during the 2012 election cycle drew on personal resources to finance their campaigns. FEC, 2012 Candidate Summary, http://www.fec.gov/data/CandidateSummary.do?format=html&election_yr= 2012.

II. THE FOURTEENTH AMENDMENT DOES NOT ALLOW A STATE TO VIOLATE THE FIRST AMENDMENT RIGHTS OF LAWFULLY-WEDDED DONORS IN OTHER STATES.

Just as with the majority opinion below, Amicus' first arguments go a long way toward answering the question regarding recognizing out-of-state same sex marriages. But there are three additional arguments to consider.

First, the fundamental right to make a political contribution does not differ on the state of residence of the donor or the state of the recipient. Former Justice Stevens made this point in a recent written speech, admittedly describing what current law is not:

> To the best of my knowledge, in none of the court's cases prior to *McCutcheon*, has the Court even mentioned a citizen's supposed right to participate in elections in which he or she has no right to vote. It surely has not characterized it as a "basic right" of unparalleled importance.
>
> The McCutcheon case only involved an Alabama citizen's interest in making contributions to candidates campaigning in other states – an activity that the court has not yet held to be protected by the First Amendment.

Taking the Stand: Oops! A View from the Bench, Washington Lawyer (Feb. 2014). In a later rebuttal, campaign finance experts and scholars Walter Webber and Hans von Spakovsy wrote:

> Justice Stevens contends that Americans should not be able to spend money to influence the outcome of an election that they are ineligible in vote in. [but] Americans [] have important, immediate interests in governance throughout the nation, not just in their own particular state. This is especially true of candidates for Congress, as they vote on legislation with nationwide impact.[12]

Walter Webber & Hans von Spakovsy, *How a Former Justice Wants to Restrict Political Participation*, RealClearPolitics.com (Feb. 14, 2015), http://www.realclearpolitics.com/articles/2015/02/14/how_a_former_justice_wants_to_restrict_your_political_participation_125566.html.

The parallel to today's case is clear. A state must consider out-of-state donors equally to its in-state donors. And unfortunately for Respondents, when they are mistreating donors in their states, they are mistreating equal donors from out-of-state. Other states that have created same-sex spouses must be entitled to Respondents' spousal exemptions. And the other side of the coin is true: if Respondents are abridging the rights of same-sex couples in their states, they are also abridging the right of couples living in other states that are prohibiting them from marrying.

Second, there is an enormous weight of precedent holding that a state cannot discriminate against a lawful resident of another state who seeks to be a petition circulator for an in-state candidate. *See,*

---

[12] And as we have recently seen, popular and well-financed governors also seek and win national office.

e.g., *Nader v. Blackwell*, 545 F.3d 459, 475 (6th Cir. 2008) (holding that an Ohio law requiring candidate petition circulators to be registered to vote and residents of the state implicated and violated out-of-state circulators' First Amendment rights); *Libertarian Party of Va. v. Judd*, 881 F. Supp. 2d 719, 726 (E.D. Va. 2012), *aff'd*, 718 F.3d 308 (4th Cir. 2013).

Drawing on this Court's decision in *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999), the Ninth Circuit in *Nader v. Brewer* struck down an Arizona law that required petition circulators to be state residents. 531 F.3d 1028, 1035 (9th Cir. 2008). The Ninth Circuit found the in-state residency requirement to be a petition circulator for Arizona candidates created "a severe burden on Nader and his out-of-state supporters' speech, voting and associational rights." *Id.*

Discrimination against petition circulators just because they live out of state "directly infringes upon the Constitutional rights of candidates, voters, petition circulators, and political parties and is subject to the most exacting scrutiny by this Court." *Libertarian Party*, 881 F. Supp. 2d at 726. Because states have been unable to present any compelling reason to justify that infringement courts have found these laws violate the First and Fourteenth Amendments to the U.S. Constitution.

Making a political contribution, just as participating in the petition process, is a vital means for expressing a person's support for a candidate. Amicus believes that it is not just in-state candidates whose rights are diminished, but also those of the out-of-state residents themselves who wish to

equally contribute or circulate a petition in another state. *Lerman v. Bd. of Elections*, 232 F.3d 135, 143 (2d Cir. 2000) (recognizing a petition circulator's "rights to engage in interactive political speech and expressive political association across state electoral district boundaries.")

Accordingly, if a state violates the Fourteenth Amendment when it discriminates against out-of-state residents seeking to circulate a ballot referendum, or a candidate's petitions, it follows that any law that does not respect the status of out-of-state donors is also invalid. Contributions of time and contributions of money are both core First Amendment activities, and all lawfully married spouses or couples have an equal right to support the candidate of their choice wherever each may live.

Third, the First Amendment has forbidden several states' attempts to limit campaign contributions to state candidates from out-of-state donors. In *Landell v. Sorrell*, the Second Circuit found that a law limiting out-of-state contributions to 25 percent of all the candidates' contributions violated the equal speech rights of non-resident donors. 382 F.3d 91 (2d Cir. 2004), *rev'd on other grounds sub nom. Randall v. Sorrell*, 548 U.S. 230, 239 (2006).[13] The court further stated that an "out of state contribution limit isolates one group of people (non-residents) and denies them the equivalent First Amendment rights enjoyed by others (Vermont residents)." *Id.* at 146.

In overturning the discrimination against out-of-

---

[13] The parties did not challenge that holding before this Court in *Randall*, 548 U.S. at 239.

state donors, the court noted that "many non-residents have legitimate and strong interests in Vermont and have a right to participate, at least through speech, in those elections." *Id.* at 146-47.[14]

With these precedents, Amicus believes a state government does not have a permissible interest in disproportionately curtailing the voices of some donors because it questions the values of who or what they are, where they live, or what they have to say. If Respondents give their married couples two contribution limits, then it must give all lawfully-wedded couples that same spousal exemption.

CONCLUSION

Amicus agrees with the dissenting opinion below but also with several sentiments expressed in the majority opinion. By eloquently describing its conundrum over the democracy-versus-litigation path to same sex marriage, the majority inadvertently and repeatedly makes our point: if we are going to rely on direct democracy as the constitutionally respected vehicle for change, then the constitutional rights of those participating in that democracy cannot be abridged.

The majority then helps Amicus by noting that a law that impairs a fundamental right is subject to unforgiving scrutiny. The right to make a political contribution is a fundamental right prominently placed in the Constitution's First Amendment's protection of speech. This *is* a case in which campaign finance dysfunction mars the political

---

[14] The Ninth Circuit has rejected in nearly bright-line form, a limitation on non-resident circulator restrictions. *VanNatta v. Keisling*, 151 F.3d 1215, 1217-18 (9th Cir. 1998).

process. And that is why this Court must address the First Amendment violations created by Respondents' laws.

But in the end, it is the dissent below that is correct. It reveals the "you must not have that right because you've never had that right" argument as a circular self-reinforcing pretense of truth.

A state cannot have election laws that discriminate among its citizens, or other, non-election laws that provably allow unequal participation. A prohibition against same-sex marriage is one of those provably unequal laws: it creates unconstitutional differences between similar couple's rights to make political contributions.

Although campaign finance debates can be contentious, most agree the law begins with the proposition that people have an equal First Amendment right to make a campaign contribution. Amicus supports that premise, but the combination of Respondents' anti-marriage and campaign finance laws do not.

Respectfully submitted,

CRAIG ENGLE
(Counsel of Record)
THORNE MAGINNIS*
ARENT FOX LLP
1717 K Street, N.W.
Washington, D.C. 20036
(202) 857-6000
craig.engle@arentfox.com

BRETT G. KAPPEL
AKERMAN LLP
750 Ninth Street, N.W.
Suite 750
Washington, D.C. 20001
(202) 393-6222

**Admitted in Virginia only; supervised by principals of the firm*

Counsel for *Amicus Curiae*

March 6, 2015